

May 8, 2013

**Answers to April 30, 2013 Letter from Senator Boxer to EPA Administrator Perciasepe**

**1) Describe EPA's investigation of the West, Texas facility, including timelines and scope.**

**EPA Response:** Once the property where the former West Chemical & Fertilizer Co was located, has been released by the ATF, the Regional RMP inspectors will visit the facility, to conduct further investigations in coordination with other Federal Agencies. We will evaluate all available records and interview transcripts with regard to the 112(r) program.

**2) Why is ammonium nitrate not on the list of covered chemicals that facilities must report to EPA under the Risk Management Program?**

**EPA Response:** The Agency developed criteria for listing toxic and flammable chemicals and specified substances on the list of covered chemicals under the Risk Management Program (the "RMP list") after notice and comment rulemaking (59 FR 4478, January 31, 1994). In this rule, EPA also listed Division 1.1 explosives - a category of high explosives defined by Department of Transportation (DOT) classification. Ammonium Nitrate (AN), when produced in its most explosive form intended for use as an explosive, meets Division 1.1 criteria. Ammonium nitrate fertilizer does not meet Division 1.1 criteria and would not have been regulated under the RMP list rule.

The Institute of Makers of Explosives ("IME") petitioned for judicial review challenging the listing of high explosives (*IME v. EPA*, D.C. Cir. No. 94-1276). Among IME's objections to the rule, it argued that existing regulations by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), DOT, Mine Safety and Health Administration (MSHA), and Occupational Safety and Health (OSHA) already adequately regulated DOT Division 1.1 explosives. In a settlement with IME, the Agency agreed to propose delisting explosives and IME agreed to undertake certain measures to enhance local emergency response and dismiss its case if EPA ultimately delisted high explosives (61 FR 13858, March 28, 1996). The measures IME agreed to are discussed in the preamble to the proposed rule to delist high explosives (61 FR 16598, April 15, 1996) and in the preamble to the final rule delisting high explosives (63 FR 640, January 6, 1998).

**3) Please provide a list of all chemicals regulated through the Risk Management Program under Section 112(r) and the types of uncovered chemicals EPA could add to the list or otherwise address under the general duty clause of Section 112(r).**

**EPA Response:** The RMP rule covers 77 toxic and 63 flammable substances and mixtures at specified threshold quantities and concentrations (see 40 CFR Part 68.130, <http://www.gpo.gov/fdsys/pkg/CFR-2011-title40-vol15/xml/CFR-2011-title40-vol15-sec68-130.xml>). Clean Air Act Section 112(r)(3) gives EPA authority to list substances "which, in the case of an accidental release, are known to cause or may reasonably be anticipated to cause death, injury, or serious adverse effects to human health or the environment." Section 112(r)(3) also named 16 specific substances to be listed and required EPA to include at least 100 substances which pose the greatest risk of causing death, injury, or serious adverse

effects to human health or the environment from accidental releases into the air. EPA is prohibited from including on the list any air pollutant for which a national primary ambient air quality standard has been established, except anhydrous sulfur dioxide, which the statute required EPA to list. In listing substances, CAA Section 112(r)(4) requires EPA to consider specific factors including the severity of any acute adverse health effects associated with accidental releases of the substance, the likelihood of accidental releases of the substance, and the potential magnitude of human exposure to accidental releases of the substance. There are limits on EPA's authority to cover flammable substances in certain instances. Within the forgoing constraints, EPA has authority to add substances to the RMP list via notice and comment rulemaking.

The Section 112(r)(1) General Duty Clause applies to all substances listed under Section 112(r)(3) and any other extremely hazardous substance. The CAA does not define the term extremely hazardous substance, but the legislative history of the Clean Air Act suggests criteria which EPA may use to determine if a substance is extremely hazardous. The Senate Report stated the intent that the term "extremely hazardous substance" would include any agent "which may or may not be listed or otherwise identified by any Government agency which may as the result of short-term exposures associated with releases to the air cause death, injury or property damage due to its toxicity, reactivity, flammability, volatility, or corrosivity" (Senate Committee on Environment and Public Works, Clean Air Act Amendments of 1989, Senate Report No. 228, 101st Congress, 1st Session 211 (1989)).

***4) Provide me with a list of all chemicals that facilities are required to report to state and local emergency planning authorities but are not required to report to EPA.***

**EPA Response:** Under the Emergency Planning and Community Right-to-know (EPCRA) Act, there are two (2) sections where information is provided to state and local emergency planning authorities but not to EPA. Those sections are section 302 of the Emergency Planning and Notification Subtitle and sections 311/312 within the Community Right-to-Know Reporting Requirements Subtitle. Under section 302, a facility that has an Extremely Hazardous Substance (EHS) on-site at or above its Threshold Planning Quantity (TPQ) must notify the State Emergency Response Commission (SERC) and Local Emergency Planning Committee (LEPC), as well as participate in local emergency planning activities. That list of chemicals is found here: <http://www.gpo.gov/fdsys/pkg/CFR-2012-title40-vol29/pdf/CFR-2012-title40-vol29-part355-appA.pdf> (alphabetical order) or <http://www.gpo.gov/fdsys/pkg/CFR-2012-title40-vol29/pdf/CFR-2012-title40-vol29-part355-appB.pdf> (CAS No. order)

Sections 311/312 establish the community right-to-know requirements in order to ensure information on chemicals in the community is provided to help communities prepare for and respond to chemical accidents. Under these sections, facilities that have either (1) a hazardous chemical present at or above 10,000 pounds or (2) an EHS present at or above its TPQ or 500 pounds—whichever is the lesser, are required to submit an Emergency and Hazardous Chemical Inventory form (Tier II) and a Material Safety Data Sheet (MSDS) for that chemical to their SERC, LEPC, and local fire department. A chemical is hazardous if defined as such under the Hazard Communication Standard (HCS) of the Occupational Safety and Health Act (OSHA). There is not a single comprehensive list of all the hazardous chemicals

covered. If a facility is required by OSHA to develop and/or maintain a MSDS for that chemical and it is present at or above the threshold discussed above, it must be reported.

***5) How many facilities fall under Sec. 112(r) of the Clean Air Act and where are they located?***

***EPA Response:*** Approximately 12,800 facilities are currently covered by the 40 CFR Part 68 Risk Management Program regulations. EPA knows the identity and location of these facilities because they are required to submit a risk management plan (RMP) to EPA. Facilities covered by the General Duty Clause of CAA Section 112(r)(1) are not required to register with EPA unless they are also subject to 40 CFR Part 68. RMP facilities are located in all 50 states, as well as the U.S. territories of Puerto Rico, the U.S. Virgin Islands, and Guam.

***6) How often are those covered facilities inspected by EPA officials?***

***EPA Response:*** EPA inspects approximately 500 RMP facilities each year in 42 states and 3 territories, including approximately 150 high-risk facilities. EPA has granted a delegation of authority to implement the Section 112(r) Risk Management Program to 8 states and 5 counties. State or local implementing agency officials conduct inspections at RMP facilities within these delegated jurisdictions, while EPA officials conduct RMP inspections in all remaining states and territories. High risk facilities are identified using the RMP National Database and include facilities that have had serious accidental releases of regulated substances, facilities that have more than 100,000 people in their worst-case release scenario zone, and facilities that have extremely large quantities or numbers of regulated substances on site. High risk facilities receive a higher inspection priority than other RMP facilities and EPA devotes more inspection resources (i.e., people and time) to high-risk facility inspections. High-risk RMP facilities are inspected approximately once every 11 years, and non high-risk RMP facilities are inspected approximately once every 28 to 30 years, although circumstances may cause certain facilities to be inspected more frequently.

***7) Who at EPA has lead responsibility for Sec. 112(r) of the Clean Air Act, and how does EPA ensure oversight is regularly conducted at covered facilities.***

***EPA Response:*** The Office of Emergency Management (OEM) within EPA's Office of Solid Waste and Emergency Response (OSWER) is the lead headquarters program office for implementation of CAA Section 112(r), and the Office of Civil Enforcement / Waste and Chemical Enforcement Division within the Office of Enforcement and Compliance Assurance (OECA) is the lead headquarters division for civil enforcement of section 112(r). OSWER and OECA work together closely on this program to develop and implement regulations and policy, carry out inspections and conduct enforcement at covered facilities.

Several activities by EPA ensure oversight of RMP facilities, including:

- EPA operates and maintains the RMP reporting system and the RMP National Database. RMP\*eSubmit is EPA's internet-based system for electronic submission of risk management plans. Covered facilities electronically submit, update, and if necessary deregister their RMP with EPA. The submission system contains a number of automated data validation checks to ensure that RMPs meet minimum data quality criteria before they can be submitted. RMP

submissions are electronically collated into the RMP National Database. Using this database, EPA can review and audit RMPs and conduct various analyses to identify high risk facilities and target facilities for inspections or information requests.

- EPA oversees 8 delegated state and 5 delegated local agency programs to ensure that delegated agencies also carry out inspections and enforcement at RMP facilities. EPA also provides support to delegated agencies through grants or cooperative agreements, training, and inspection or case development support when requested.
- EPA carries out a comprehensive inspector training program to ensure that all EPA and delegated agency inspectors have received appropriate inspection training.
- Additional compliance monitoring, compliance assistance, and oversight activities such as RMP audits, information request letters, industry association presentations, training workshops and seminars, etc., are conducted.
- EPA carries out numerous enforcement actions when facilities are found to be out of compliance with the Risk Management Program rules or the CAA Section 112(r)(1) General Duty Clause, either during an inspection or when compliance information is gained by other means such as information request letters. Enforcement actions can include monetary penalties, administrative compliance orders and injunctions, supplemental environmental projects, and criminal sanctions. In FY 2012, EPA carried out over 300 enforcement actions under CAA Section 112(r), with penalty amounts ranging from hundreds of dollars to approximately \$6,700,000. Where significant noncompliance is discovered, EPA seeks large penalties under CAA 112(r) in order to deter future violations by the same violator and other members of the regulated community, ensure a level economic playing field, and encourage the adoption of safety measures in order to prevent chemical accidents.

EPA's combined annual program budget for the CAA Section 112(r) program and the Emergency Planning and Community Right-to-Know Act (EPCRA) program is approximately \$14 million. That amount funds all headquarters and regional FTE, associated headquarters and regional contracts, operation of the RMP Reporting Center (which includes operation of the RMP submission system, RMP National Database, and related software applications), inspector training, and all facility inspections. EPA has approximately 40 FTE devoted to conducting RMP inspections nationwide.

***8) Describe any and all fines issues against the West facility for failing to comply with safety standards related to chemicals.***

***EPA Response:*** EPA Region 6 conducted a Risk Management Plan (RMP) inspection at the non-title V West Chemical & Fertilizer Co. on March 16, 2006. The inspection included a walkthrough of the plant to observe the processes and the equipment, as well as a review of the facilities RMP and associated records. The inspection was conducted by one of the Region's RMP inspectors, using the National RMP Program's Level 2 inspection checklist. The checklist used included all modifications incorporated by OECA through March 14, 2005. Violations identified by the inspector included:

- failure to timely update the RMP (the update due on 2004 had not been submitted), including updating the Hazard Assessment and Hazard Review,
- failure to include consequences of deviation in operating procedures,
- failure to properly document new operator training, and
- failure to develop a formal mechanical integrity program, and failure to conduct compliance audits.

In accordance with the approved penalty policy and matrix which was in place in 2006, on June 5, 2006 the Region issued a proposed Expedited Settlement Agreement (ESA) assessing a penalty of \$2,300 to West Chemical & Fertilizer Co. West Chemical & Fertilizer submitted its updated RMP on July 7, 2006, paid the penalty and the ESA was issued final August 14, 2006.

Aside from the fines associated with the violations noted through the 2006 RMP inspection, no other actions have been taken by EPA against this company for this facility.

***9) Explain how EPA works with other agencies at the local, state, and federal level to plan for accident prevention.***

***EPA Response:*** Besides working with delegated states and localities as described above, on a state and local level, EPA coordinates and collaborates on a continuous basis with the National Association of SARA Title III Program Officials (NASTTPO). Bi-annually we meet with all NASTTPO members to discuss key and emerging issues related to the EPCRA and RMP programs. Additionally, throughout the year we exchange information and provide technical assistance to the States and locals to support them in implementing the EPCRA program.

On a federal level, we have a good working relationship with key federal agencies involved in chemical safety, including OSHA, DHS, Chemical Safety Board (CSB), and DOT. As part of our collaboration and coordination with these agencies, we meet regularly or as issues arise to discuss areas of overlap in our programs and how to work together to better implement our respective programs and promote chemical safety.

***10) Describe how EPA can ensure that information about chemical accident prevention and emergency response could be distributed more widely to responsible authorities, including through electronic databases.***

***EPA Response:*** All information reported by facilities under the EPCRA program (except for Section 313: Toxic Release Reporting) is reported directly to the state and local responsible authorities, including the State Emergency Response Commissions (SERCs), Local Emergency Planning Committees (LEPCs), and local fire departments. With regard to access to the risk management plans facilities submit under the RMP program, state and local responsible authorities have two ways to receive that information. The state and local responsible authorities can either request a copy of the RMP database on a CD from the

EPA or they can request direct secure internet-based access to the RMP database by registering for an on-line Central Data Exchange (CDX) account.

EPA also considered making a portion of the RMP database available via EPA's public website. However, due to comments received from members of Congress and several federal agencies, including DHS, expressing concern that providing such data on-line may pose a threat to national security, EPA decided not to proceed.

In 2000, a database known as E-Plan (Hazmat Emergency Management Information System) was started by EPA Region 6 through a cooperative agreement with University of Texas at Dallas (UT Dallas) in order to make facility and hazardous material information more readily available to first responders in the Region. In addition to Tier II (Hazardous Chemical Inventory) data, E-Plan contains other information such as maps of area surrounding a fixed facility, Facility Emergency Response Plans, Risk Management Plans, Federal Area Contingency Plans, Facility diagrams and building floor plans, and Material Safety Data Sheets (MSDS).

The data system has expanded over time and currently contains records for over 350,000 Tier II facilities in 36 states, all RMPs submitted in 50 states and four US territories, and 24,673 of the most common hazardous chemicals in use in the U.S. More than 4,900 emergency personnel have been trained as authorized E-Plan users in 45 states. While EPA initially provided some financial support, E-Plan has been financially supported by UT Dallas (\$300K per year) and DHS (\$700K per year). However, beginning October 2013, DHS will no longer be able to provide its share of funding, so the viability of E-Plan remains uncertain.